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No. .....

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1985

—o—

CHARLES DARE SCHAUT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

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DATED: April 17, 1986

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in a prosecution for willful failure to file income tax returns and willful filing of false employee withholding allowance certificates in violation of 26 U.S.C. 7203 and 7205, the jury must be instructed that it is to judge the subjective intent of the Defendant rather than the objective reasonableness of his beliefs.

2. Whether a Defendant in a criminal tax prosecution is entitled to have the jury instructed as to his theory of defense.

3. Whether the Defendant was denied a fair trial by the trial court's emasculation and denigration of the defense.

4. Whether it was reversible error for the district court to refuse to permit the Defendant access to the full statement of the IRS Special Agent so that it could be used for impeachment purposes.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Contents	ii
Table of Authorities	iii
Orders Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	9
Conclusion	20
Appendix A—Ninth Circuit Order of August 20, 1985	A-1
Appendix B—Ninth Circuit Order of January 29, 1986	B-1

TABLE OF AUTHORITIES

Page

Battjes v. U.S., 179 F.2d 1 (C.A. 6, 1949) 10

Berger v. U.S., 255 U.S. 22 (1921) 14, 19

Bird v. U.S., 180 U.S. 356 (1901) 12, 13, 14

Calderon v. U.S., 279 F. 556 (C.A. 5, 1922) 13

Dennis v. U.S., 384 U.S. 855 (1966) 19

Goldberg v. U.S., 425 U.S. 94 (1967) 19

Hagler v. U.S., 172 F.2d 986 (C.A. 10, 1949) 10

In Re Murchison, 349 U.S. 133 (1955) 14, 19

Levine v. U.S., 261 F.2d 747 (D.C. Cir., 1958) 12, 13

Mann v. U.S., 319 F.2d 404 (C.A. 5, 1963), cert. denied 375 U.S. 986 (1964) 10

Perez v. U.S., 297 F.2d 12 (C.A. 5, 1961) 12, 13

Strauss v. U.S., 376 F.2d 416 (C.A. 5, 1967) 12, 14

Tatum v. U.S., 190 F.2d 612 (D.C. Cir., 1951) 12, 13

Williams v. U.S., 131 F.2d (D.C. Cir., 1942) 13

Yarborough v. U.S., 230 F.2d 56 (C.A. 4, 1956), cert. denied, 351 U.S. 969 10

U.S. v. Aitken, 755 F.2d 188 (C.A. 1, 1985) 9, 10, 12

U.S. v. Bishop, 412 U.S. 346 (1973) 9, 12

U.S. v. Bland, 697 F.2d 262 (C.A. 8, 1983) 15

U.S. v. Burton, 737 F.2d 439 (C.A. 5, 1984) 9, 10

U.S. v. Day, 591 F.2d 861 (D.C. Cir., 1979) 17

U.S. v. Guerrero, 667 F.2d 862 (C.A. 10, 1981) 17

U.S. v. Ingredient Technology Corp., 698 F.2d 88, cert. denied — U.S. —, 103 S.Ct. 3111 (C.A. 2, 1983) 10

TABLE OF AUTHORITIES—Continued

Page

U.S. v. Ires, 609 F.2d 930 (C.A. 9, 1979) 18

U.S. v. Mills, 704 F.2d 1553 (C.A. 11, 1983) 18

U.S. v. Murdock, 290 U.S. 389 (1933) 9, 12

U.S. v. Phillips, 775 F.2d 262 (C.A. 10, 1985) 9, 10

U.S. v. Pomponio, 429 U.S. 10 (1976) 9, 10, 12

U.S. v. Smith, 735 F.2d 1196 (C.A. 9, 1984) 16

U.S. v. Theris, 655 F.2d 616 (C.A. 5, 1982) 17

U.S. v. Ware, 608 F.2d 400 (C.A. 10, 1975) 10

Jencks Act, 18 U.S.C. 3500 ..... 19, 20

Rule 403, Federal Rules of Evidence 17

53 *Am. Jur. Trial*, sec. 580, p. 458 12

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CHARLES DARE SCHAUT,

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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner CHARLES DARE SCHAUT ("Schaut"), prays that a writ of certiorari issue to review the unpublished order of the Ninth Circuit Court of Appeals, which affirmed his conviction on three income tax misdemeanor offenses, failure to file returns for 1979 and 1980 (26 U.S.C. 7203) and filing a false employee's withholding allowance certificate in 1981 (26 U.S.C. 7205)

This proceeding involved Schaut and the INTERNAL REVENUE SERVICE ("IRS") and raises the question of whether an individual who disagrees with the IRS can obtain a fair trial in a court which is supposed to be impartial and unbiased.

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ORDERS BELOW

The orders of the Ninth Circuit affirming the conviction and denying a petition for rehearing with suggestion for rehearing *en banc* are not published opinions. They can be found at App. A and B respectively.

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JURISDICTION

The order of the Ninth Circuit was entered on August 20, 1985 (App. A). A petition for rehearing, with suggestion for rehearing *en banc*, was denied on January 29, 1986 (App. B). On March 18, 1986, Associate Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including April 18, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 5

No person shall be . . . deprived of life, liberty, or property, without due process of law. . .

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense.

Title 26 U.S.C. 7203:

Any person required under this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015) . . . who willfully fails to make such return . . ., at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Title 26 U.S.C. 7205:

Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $1,000 or imprisoned not more than 1 year, or both.

Title 18 U.S.C. 3500(b):

After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

Title 18 U.S.C. 3500(e)(1):

The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means:

(1) a written statement made by said witness and signed or otherwise adopted or approved by him[.]

———o———

STATEMENT OF THE CASE

After a jury trial in the United States District Court for District of Arizona, Schaut was convicted on two counts of willfully failing to file income tax returns for the years 1979 and 1980 and of willfully filing a false and fraudulent employee withholding allowance certificate with his employer on May 29, 1981 (App. A, p.1 infra).

At the time of trial, Schaut was a Captain for American Airlines. He served as a combat fighter pilot in the U.S. Airforce from 1954 until October, 1965. (T.322-324)*

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* T. refers to the trial transcript.

He is married and has four adult children and one minor son. (T.323)

1. Schaut's defense to the charges was that he had not acted willfully at the time periods in question. At trial he testified that he never thought of filing an income tax return as a legal duty; he filed because everyone else did (T.329) Even when he stopped filing, he did not disagree with the Internal Revenue Code (the Code); nor did he believe the Code was unconstitutional. (T.329-330).

Through his study of the economic theories of LUDWIG VON MISES, the Constitution and the diaries of the constitutional convention as contained in the book *DOCUMENTS ILLUSTRATIVE OF THE UNION OF AMERICAN STATES*, Schaut came to believe that he had an inalienable right to work and to enjoy the fruits of his work. His activity in that regard was not a taxable event. (T.341).

Schaut's beliefs were buttressed by his study of the Congressional Record concerning the proposed income tax amendment and the anticipated income tax. He concluded that Congress had never intended for a tax on incomes to include a tax on the workingman's wages. (T.359-370) The IRS was simply misleading the public. (T.348)

Based upon these beliefs, Schaut filed Forms 843 with the IRS, claiming a refund for income taxes he had paid in 1978 and 1979. He submitted an eleven page memorandum in support of his claims (T.526). The IRS rejected one claim and never responded to the other. (T. 530) Schaut then filed a lawsuit to prosecute his claim. (T.530).

Schaut did not believe he was violating the law by his actions. (T.552). He did not file returns for 1979 and 1980 because he did not believe he had sufficient income to be required to do so. (T.370). He submitted an exempt Form W-4 in 1981 for the same reason. He had tried to question the IRS in a series of letters, but never received any answers to his correspondence.

At the conclusion of the trial, the district court gave the following instructions, *inter alia*, relating to intent:

> You should return a guilty verdict if, but only if, you find the evidence so convincing that an ordinary person would be willing to make the most important decisions in his or her own life on the basis of such evidence. (T.806)
>
> The Defendant's conduct is not "willful" if he acted through negligence, inadvertance, justifiable excuse, or mistake, or due to his good faith misunderstanding of the requirements of the law. You may consider the reasonableness of the Defendant's beliefs in determining whether or not they were held in good faith. (TR.806)

2. At the jury instruction conference, Schaut tendered fifteen different variations of his proposed theory of defense instructions. (T.820) The tendered instructions were all refused (T.820): the jury was instructed without any theory of defense instructions. (T.908-923). Schaut moved for a mistrial on the basis that the jury was improperly instructed on the law and on the renewed basis of the objections he had made during the jury instruction conference. (T.924).

3. During the course of the trial, the district judge continuously interjected himself into the proceedings in such a way as to totally discredit the defense in the eyes of

the jury. Schaut attempted to present five witnesses (T. 293, 321, 679, 753 and 780) and thirty-five exhibits.

The district court refused to permit the jury to hear any of the testimony of two defense witnesses (T.753, 780) and only allowed a portion of the testimony of a third witness (T.734) The court also excluded twenty-three of the thirty-five defense exhibits; only twelve of Schaut's exhibits were admitted into evidence. (T. 382, 387, 397, 402).

Schaut made offers of proof concerning each excluded witness (T.734, 753 and 780). He also moved for a mistrial based upon this denigration of his defense (T. 830-31).

The district court permitted the prosecution to cover the time frame from 1966 through 1984 during its case (T.147-148; 192, 295). Schaut, however was ordered to restrict his evidence to the pre-indictment time period, 1966 to December 13, 1983 (T.296). The court further restricted that time frame the following day, during an in chambers conference (T.383).

During that conference, Schaut was not just limited to the period prior to notification of criminal investigation, January, 1982; the court also ruled the majority of the defense exhibits irrelevant (T.380-429).

Even though Schaut was attempting to establish his subjective good faith through his own testimony and through the testimony of like-minded colleagues, the court repeatedly instructed the jury that such testimony was not being offered for the truth of the matter asserted. Eg. (T.296, 320) During Schaut's testimony, the court

repeatedly instructed the jury that what Schaut was saying was not the law. Eg. (T. 435, 437, 441, 464).

The district court coached the prosecution into making more objections (T.304), advice which was followed by the prosecutrix. (T.304, 305, 306, 307, 308, 309, 310). The court refused to allow Schaut to develop his background and character (T.322-326). It refused to allow into evidence documents which Schaut had read and relied upon in formulating his beliefs. (T.337, 389, 343, 359, 380-429). It refused to permit Schaut to testify about the substance of his conversations with colleagues concerning taxes (T.502). It refused to permit the testimony of two lawyers (T.753, 780) one of whom was offered as a summary witness. (T.730) Both lawyers would have testified as to the reasonableness of Schaut's beliefs (T. 753-780; 780-797). The district court denied Schaut's counsel (who was from out of State) access to the law library, further frustrating the defense. (T.142, 240)

During closing arguments, the court allowed the prosecution to use, over Schaut's objection, summary charts which were not in evidence and which highlighted the amount of Schaut's alleged gross income and tax liabilities even though the issue of whether or not Schaut owed any taxes was legally irrelevant and immaterial to the case. (T.832-33). This prejudicial error was exacerbated by the fact that the court allowed the gross income chart for 1979 and 1980 to remain in full view of the jury while they were being instructed on the law.

4. During the trial, the prosecution tendered IRS Special Agent ALAN LEKSANDER ("Leksander") as a witness. Upon cross-examination, the defense moved for production of an uncensored copy of his November 2, 1982

report (T.236-242). The district court conducted an *in camera* examination of the document, looking only for exculpatory material and not for impeachment information. (T.242-243). It then ruled that the full report was not producible to Schaut (T.242). The uncensored version was ordered filed under seal for review by the Ninth Circuit. It ruled that the trial court's action was harmless error.

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REASONS FOR GRANTING THE WRIT

1. In holding that the trial court properly instructed the jury on the question of willfulness, the Ninth Circuit order conflicts with *U.S. v. Murdock*, 290 U.S. 389 (1933); *U.S. v. Bishop*, 412 U.S. 346 (1973); *U.S. v. Pomponio*, 429 U.S. 10 (1976); *U.S. v. Burton*, 737 F.2d 439 (C.A. 5, 1984); *U.S. v. Aitken*, 755 F.2d 188 (C.A. 1, 1985); *U.S. v. Phillips*, 775 F.2d 262 (C.A. 10, 1985).

This Court in *U.S. v. Murdock*, described the specific intent of wilfulness as follows:

> He whose conduct is defined as criminal is one who "willfully" fails . . . to make a return. Congress did not intend that a person by reason of a bona fide misunderstanding as to his . . . duty to make a return . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct.

290 U.S. at 396. In *U.S. v. Bishop*, this court held that the element of willfulness is the same in all federal tax offenses, whether felonies or misdemeanors. In so holding, the Court observed that:

> the word 'wilfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty.

412 U.S. at 360.

The court emphasized this point in *U.S. v. Pomponio*, where it stated that:

> . . . willfulness in this context simply means a voluntary, intentional violation of a known legal duty.

429 U.S. at 12. Following these decisions, six courts of appeals either explicitly or implicitly required proof of subjective intent to disobey the requirements of the tax structure at issue in order to establish that the Defendant acted with the requisite intent: First Circuit—*U.S. v. Aitken*, supra; Second Circuit—*U.S. v. Ingredient Technology Corp.*, 698 F.2d 88, 97, cert. denied — U.S. —, 103 S.Ct. 3111 (1983); Fourth Circuit—*Yarborough v. U.S.*, 230 F.2d 56, 61, cert. denied, 351 U.S. 969 (1956); Fifth Circuit—*U.S. v. Burton*, supra; *Mann v. U.S.*, 319 F.2d 404, 409-10 (1963), cert. denied, 375 U.S. 986 (1964) (court found an instruction that invited the jury "to speculate as to what any other person . . . would reasonably have expected to be the consequence of [his] conduct "to be plain error); Sixth Circuit—*Battjes v. U.S.*, 179 F.2d 1, 4 (1949) (a bona fide misconception of the law is a defense to failure to file regardless of the general presumption that one knows the law); Tenth Circuit—*U.S. v. Phillips*, supra; *Hagler v. U.S.*, 172 F.2d 986, 989 (1949); *U.S. v. Ware*, 608 F.2d 400, 405 (1975). In these circuits, the prosecution must prove the subjective intent of the accused ie, that the proscribed act or omission was committed voluntarily and intentionally, with knowledge of its illegality.

The order below departs from this subjective standard and replaces it with the common law tort standard of the reasonably prudent man. Since wilfulness is an element of the majority of the federal tax offenses (see 26 U.S.C. 7201-7207), the question of the showing necessary to establish that element is crucial to the criminal enforcement of the federal tax laws.

The court of appeals misconstrued Schaut's challenge to the jury instructions by limiting their analysis to only one aspect of that challenge (App. A, infra, p.7 A) and in so doing, violated the maxim that the effect of the instructions must be determined by way in which a reasonable juror could have interpreted them. *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979).

When the district court's instructions are considered as a whole, it becomes apparent that a reasonable juror could have concluded that if they thought it was unreasonable to believe what Schaut believed, then Schaut was not acting in good faith. It is more likely than not that the jury in this case focused upon the question of whether they—as typical citizens—could have reasonably believed that wages did not constitute income, rather than upon the question of whether Schaut actually believed that notion. If the jury were polled and questioned as to whether they believed that Schaut in fact believed as he testified, it cannot be said conclusively that they would say—no we do not believe that Schaut believes his wages are not income.

This court's formulation of willful standard does not authorize a substitution of willfulness for some reasonably prudent man standard. The instructions below al-

most certainly induced the jury to consider their personal beliefs rather than to weigh the credibility of Schaut's testimony with respect to his beliefs. This is not what this Court intended by its *Murdock*, *Bishop* and *Pomponio* formulations.

Any doubt as to whether Schaut was prejudiced by this error must be resolved in his favor. *Aitken*, *id.*, at 755 F.2d 194.

2. In holding that the trial court properly rejected all theory of defense instructions, the court of appeals order conflicts with *Bird v. U.S.*, 180 U.S. 356 (1901); with *Tatum v. U.S.* 190 F.2d 612 (D.C. Cir., 1951); *Levine v. U.S.*, 261 F.2d 747 (D.C. Cir., 1958); *Perez v. U.S.*, 297 F.2d 12 (C.A. 5, 1961); *Strauss v. U.S.*, 376 F.2d 416 (C.A. 5, 1967) and with the fundamental principle of American jurisprudence that:

> in criminal cases the Defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own.

53 *Am.Jur.*, *Trial*, section 580, p.458 as quoted in *Tatum v. U.S.*, supra at 190 F.2d 617.

The court of appeals ruled that the jury was adequately instructed on Schaut's defense. The instruction, relating to a good faith misunderstanding of the law, generally pointed to Schaut's theory of defense.

The charge was therefore erroneous because Schaut was entitled to theory of defense instructions which pre-

cisely and specifically, rather than merely generally or abstractly, pointed to his theory of defense. *Perez v. U.S.*, supra at 297 F.2d 15-16.

As Circuit Judge BAZELON noted in *Tatum*, supra, at 190 F.2d 617:

> trial by a jury of peers "is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?"

quoting *Williams v. U.S.*, 131 F.2d 21, 23 (D.C. Cir., 1942). For this reason, the rule is that it is reversible error for the court to refuse a request to instruct specifically and precisely as to the Defendant's theory of the case. *Levine v. U.S.*, supra, at 261 F.2d 748.

The Court's holding in *Bird v. U.S.*, supra at 180 U.S. 356, 361 has been interpreted to mean that:

> Where the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory.

Calderon v. U.S., 279 F. 556, 558 (C.A. 5, 1922).

Here, as in *Bird*, the questions raised in Schaut's tendered theory of defense instructions were fundamental to the resolution of the case. Here, as in *Bird*, Schaut's sole defense rested upon that question—did he act willfully? By the instructions given, the jury was left to pass upon that vital question without reference to Schaut's evidence. 180 U.S. at 362.

The district court evaluated and screened the evidence supporting Schaut's defense and upon that evaluation,

declined to charge on Schaut's proferred defense. This had the effect of diluting Schaut's jury trial and directing a verdict on that issue against Schaut. Such action is impermissible and cause for a new trial. *Bird, id.* at 180 U.S. 362; *Strauss v. U.S.*, supra, at 376 F.2d 419.

Here, as in *Bird,* Schaut brought this matter to the court's attention. He tendered fifteen variations of his theory of defense, all of which the district court rejected over defense objection (T.821-26; 829). The jury was instructed without the benefit of any precise or specific theory of defense instructions (T.908-923). Schaut objected to the instructions as read and moved for a mistrial. (T. 924).

3. The court of appeals order approving the conduct of the district judge conflicts with *In Re Murchison*, 349 U.S. 133 (1955); *Berger v. U.S.*, 255 U.S. 22 (1921) and with another fundamental principle of American jurisprudence —the right to a fair trial. Part and parcel of Schaut's right to due process of law, is his right to a fair trial before a tribunal free from bias or prejudice. *In Re Murchison*, supra at 349 U.S. at 136-137. As Justice McKenna stated sixty-five years ago:

> Tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial. . .

Berger v. U.S., 255 U.S. 22, 35-36 (1921).

Contrary to this fundamental notion of due process, the trial court time and again demonstrated its bias and prejudice, by its evidentiary rulings, its imposition of a double standard of relevance, and by its emasculation to the point of derision of the defense placed before the jury

—that Schaut in good faith believed he was not required to file returns and that he was entitled to file an exempt Form W-4.

A court's slightest indication that it favors the prosecution can have an immeasurable effect upon a jury. *U.S. v. Bland*, 697 F.2d 262, 265-266 (C.A. 8, 1983). The trial court below continually indicated its favoritism for the prosecution in many ways. It constantly belittled the defense in the guise of instructing the jury that the defense testimony was "not being offered for the truth of the matter asserted" (e.g. T.296, 435, 437, 441, 446).

During the course of the trial, the court imposed a double standard of relevance, allowing the prosecution to cover the time period from 1966 through 1984, allowing them to inquire into state income taxes, real property taxes and a myriad of other matters.*

Schaut, on the other hand, was not allowed to go into his background, not allowed to go into his current responsibilities at American Airlines, not allowed to go into anything he did subsequent to January, 1982, and not allowed to introduce into evidence documents he either relied on or which corroborated his good faith beliefs. These documents included, *inter alia*, the Constitution; a book entitled *United States—Formation of the Union;* another book entitled *Constitution of the United States of America, Analysis and Interpretation;* excerpts from

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* The court of appeals incorrectly stated that Schaut had stipulated to the *ADMISSABILITY* of information that Schaut had not filed State income tax returns. App. A, infra, at p. 5A. In fact, Schaut stipulated to the authenticity of that information while specifically reserving the question of its relevance.

the Congressional Record of the Senate and House; a copy of the opinion in *Sniadach v. Family Finance*, 395 U.S. 337 (1969); an analysis of the *Brushaber* decision written by an attorney; the attachments to Schaut's letter to Special Agent Leksander dated November 12, 1981, as well as a follow-up letter dated November 13, 1981; a letter written by Peter Collorafi and adopted by Schaut concerning withholding; the Complaint in Schaut's suit against the United States in the federal district court for the Northern District of Illinois, No. 82 C 2504, which was directly related to his 843 claims; excerpts from *Tax Fraud; Intelligence Activities*—Volume 3; *Internal Revenue Service; Taxpayer Safeguards*—1982; a reply by Senator Goldwater to Schaut dated July 9, 1981 and Schaut's W-4 statement sent to his employer in 1983. (Defendant's Exhibits 1, 1A, 2, 3, 4, 4B, 5, 6, part of 9, 10, 13, 14, 15E, 15F, 15G, 16 and 18).

Each of the exhibits offered by Schaut related directly to the formation of his beliefs concerning the federal income tax. They were proferred to show Schaut's lack of willfulness and were close enough in time to the acts charged to reliably reflect his intent at that time. The exhibits therefore should have been admitted into evidence. *U.S. v. Smith*, 735 F.2d 1196, 1199 (C.A. 9, 1984).

The prosecution was permitted to go into every financial transaction Schaut engaged in during 1980 through 1982, was allowed to introduce documents relating to those transactions and was allowed to introduce into evidence every payroll check received by Schaut over a three-year period all in the guise of proving Schaut had a tax liability in the relevant years and that he had

acted willfully. They were also allowed to introduce into evidence the fact that Schaut filed tax returns from 1966 through 1978. Schaut's case was, on the other hand, totally emasculated by the double standard of relevance imposed by the court and by the refusal of the court to admit into evidence the foregoing exhibits.

One cannot establish a good faith mistake of law defense when the trial court excludes all the exhibits and all the witnesses relating to the defense in addition to belittling Schaut's conclusions in the presence of the jury. The trial court clearly abused its discretion when it imposed a double standard of relevance on the issue of willfulness.

The trial court's rulings in this regard, were further evidence of its total lack of impartiality. While Rule 403, Federal Rules of Evidence permits a trial court to exclude probative evidence, it is an *extraordinary* remedy which should be *sparingly* used. *U.S. v. Thevis*, 655 F.2d 616, 633 (5th Cir., 1982). The federal rules favor admission of evidence over exclusion if the evidence has any probative value. *U.S. v. Guerrero*, 667 F.2d 862, 867 (10th Cir., 1981; *U.S. v. Day*, 591 F.2d 861, 879 (D.C. Cir., 1979). It is only when *unfair* prejudice *substantially* outweighs probative value that the rule permits exclusion. *Thevis, supra*, at 633.

Since the main issue at trial was whether or not Schaut acted willfully, the evidence offered by him was essential to establishing his good faith defense. The more essential the evidence, the greater its probative value and the less likely that a trial court should order the evidence

excluded. *U.S. v. Mills*, 704 F.2d 1553, 1560 (11th Cir., 1983).

Evidence is probative if it makes the existence of a fact material to the action more or less probable. In *U.S. v. Ives*, 609 F.2d 930 (9th Circuit, 1979), the Ninth Circuit held that evidence of correctly prepared prior income tax returns was relevant in an action for willful failure to file a valid income tax return since that evidence made willfulness more probable than it was without such evidence.

The evidence Schaut attempted to introduce made his lack of willfulness more probable than it otherwise appeared without such evidence and at minimum would have created reasonable doubt as to the wilful element of each charge. It was a clear abuse of discretion to bar Schaut from introducing those exhibits into evidence at trial and that abuse was not eliminated by allowing Schaut to testify from some of those documents even though they had not been admitted into evidence. That procedure prevented the jury from being able to weigh and evaluate the documents Schaut relied on during their deliberations, which was crucial in view of the reasonable standard the court imposed on the good faith misunderstanding defense.

The trial court's bias in this regard carried over into its exclusion of defense witnesses, its changing the relevant time period for defense purposes in the middle of the trial and its error in permitting the prosecutrix to use summary charts highlighting Schaut's salary figures and tax liabilities during closing arguments.

The cumulative effect of the trial court's actions was to deny Schaut's fundamental right to a fair trial. The

ideals of *Murchison* and *Berger* supra, were no where to be found in the trial of Dare Schaut.

4. The prosecution redacted portions of Special Agent Leksander's report and failed to produce them after Leksander's direct testimony. The trial court examined the complete report *in camera*, but limited its examination to exculpatory materials only (T.242-243). The court of appeals found this to be harmless error (App. A, infra at 7A). That finding is in conflict with *Dennis v. U.S.*, 384 U.S. 855 (1966); *Goldberg v. U.S.*, 425 U.S. 94 (1967); *U.S. v. Del Toro Soto*, 676 F.2d 13 (C.A. 1, 1982) as well as the Jencks Act, 18 U.S.C. 3500 (1982).

Leksander testified at length concerning his investigation of Schaut (T.199-209). If there was any conflict between his report and his testimony, it was impeachment ammunition for the defense. *Goldberg v. U.S.*, supra at 425 U.S. 112; *U.S. v. Del Toro Soto*, supra at 676 F.2d 16.

On appeal, the prosecution conceded that disclosure of the report for impeachment purposes was required by the Jencks Act (prosecution brief at 41). The court of appeals concluded that the district court appeared to have reviewed the report only for exculpatory matters (App. A, infra at 7A). The appeals court conducted its own review and concluded that the redacted portions did not contain Jencks material.

This conclusion is at odds with *Dennis*, supra, where the Court stated:

> In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can be properly and effectively made only by an advocate.

384 U.S. at 875. Neither the appellate court nor the trial court were in a position to determine whether those redacted portions were useful to the defense. If they contained impeachment ammunition, then they should have been produced to Schaut.

The cumulative effect of this and the errors discussed previously, was that Schaut was denied a fair trial. The failure to produce the entire report, violated the explicit language of 18 U.S.C. 3500(b).

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CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: April 17, 1986

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 84-1273

D.C. No. CR84-64-PHX-EHC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES DARE SCHAUT,

Defendant-Appellant.

MEMORANDUM*

(Filed August 20, 1985)

Appeal from the United States District Court
for the District of Arizona
Honorable Earl H. Carroll, District Judge, Presiding
Argued and Submitted June 13, 1985—
San Francisco, California

Before: BROWNING, Chief Judge, ANDERSON and NELSON, Circuit Judges.

Charles Dare Schaut appeals his conviction on two counts under 26 U.S.C. § 7203 (1982) for willful failure to file income tax returns for the years 1979 and 1980 and one count under 26 U.S.C. § 7205 (1982) for filing a false W-4 form in 1981. We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

I.

Schaut was not denied a speedy trial. Although Schaut challenges various delays as non-excludable, we conclude that only 36 non-excludable days elapsed between his initial appearance (December 29, 1983) and his trial (July 24, 1984), well within the 70-day limit mandated by 18 U.S.C. § 3161(c)(1) (1982).

a. The period from December 29, 1983 through January 12, 1984 is excludable under 18 U.S.C. §3161(h)(8)(A) because the court granted a continuance on Schaut's request to permit him to obtain an attorney.

b. The period from January 13 through January 26, 1984 is non-excludable (14 days).

c. Schaut concedes that the period from January 27 through February 24, 1984 is excludable under 18 U.S.C. § 3161(h)(1)(F) because his motion for change of venue was pending during this time.

d. The period from February 25 through March 12, 1984 is excludable under 18 U.S.C. §3161(h)(1)(G). This period was opened by Judge Plunkett's order entered on Schaut's motion transferring the case from the Northern District of Illinois to the District of Arizona and was closed by Judge Carroll's order reopening the case in Arizona. This court has held that "any period of delay 'resulting from any proceeding relating to the transfer of a case'" is excludable under section 3161(h)(1)(G), including "the time from the grant of the motion [for change of venue] until the date the transferee district receives the case papers." *United States v. Wilson*, 720 F.2d 608, 609-10 (9th Cir. 1983). Since the District of

Arizona did not receive the case papers until March 13, 1984, the entire period from February 24 through March 12 was properly excluded.

e. The period from March 13 through April 3, 1984 is non-excludable (22 days).

f. The period from April 4 through June 6, 1984 is excludable under 18 U.S.C. §§ 3161(h)(1)(F) and (J). On April 4, 1984 Schaut filed nine motions, one of which was decided on April 19 and the remaining eight on June 13 after the parties had agreed that a hearing was unnecessary.

Under 18 U.S.C. § 3161(h)(1)(F), "[a]ny period of delay . . . including . . . delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" is excludable time under the Speedy Trial Act. Schaut contends the maximum number of days during which a judge has pretrial motions under consideration that may be treated as excludable time under the Speedy Trial Act is limited by section 3161(h)(1)(J) to 30 days from the date of filing of final briefs, at least where a motion is decided without a hearing. *See, e.g., United States v. Janik*, 723 F.2d 537, 543-44 (7th Cir. 1983) (and cases cited); *United States v. Stafford*, 697 F.2d 1368, 1373 & nn. 4-6 (11th Cir. 1983). By this analysis, the 30-day "under advisement" period of section 3161 (h)(1)(J) excluded the period from May 7, when Schaut filed his reply brief, to June 6. Even if Schaut is correct, a total of only seven days of non-excludable time would have elapsed if no other motions had been filed in the interim since the motions were not finally decided until

June 13. However, as the next subsection discloses, additional motions were filed on May 21 and May 30, creating an overlapping period of excludable delay.

g. The period from May 21 through July 23, 1984 is excludable under 18 U.S.C. § 3161(h)(1)(F). The government filed a motion in limine on May 21 and Schaut filed a motion to suppress/motion in limine on May 30. Following a hearing on these motions on July 20, the court on July 24 denied Schaut's motions and partially granted the government's motion.

Under *United States v. Henderson*, 746 F.2d 619, 622-23 (9th Cir. 1984), *appeal filed*, any period of delay, whether reasonable or not, commencing with the filing of a pretrial motion until the conclusion of the hearing on such motion is automatically excludable under section 3161(h)(1)(F). Thus the court properly excluded the entire period from May 21 through July 23. Schaut's argument that the court improperly granted a "retroactive continuance," is simply incorrect.

II.

It was not error to admit evidence of "similar acts," relating to Schaut's compliance and non-compliance with tax laws. Schaut stipulated to the admission of evidence regarding his failure to file state income tax returns in 1979 and 1980, and is therefore foreclosed from challenging this evidence on appeal. Fed. R. Evid. 103(a)(1). The evidence that Schaut filed state and federal income tax returns from 1966 through 1978 and paid real estate taxes in 1979 and 1980 was admissible under Fed. R. Evid. 404(b) as relevant to Schaut's knowledge, intent

and absence of mistake. *Cf. United States v. Snow*, 529 F.2d 224, 225-26 (9th Cir. 1976) (per curiam) (past failure to file tax returns is relevant to willfulness). Moreover, the evidence was cumulative to the testimony of Donna Page, an accountant, who testified without objection that she prepared Schaut's income tax returns until 1978. *See United States v. Thornton*, 710 F.2d 513, 515 (9th Cir. 1983). The evidence that Schaut failed to file federal or state income tax returns for 1981 through 1983 and that he was still claiming to be exempt from withholding as of the date of trial was similarly admissible under Fed. R. Evid. 404(b) as relevant to knowledge, intent and absence of mistake. *See Snow*, 529 F.2d at 225-26.

Books and documents Schaut claimed he had relied upon in forming his good faith belief that he was not required to file income tax returns were properly excluded because they contained statements of law not within the province of the jury. No prejudice results from such an exclusion where, as here, the defendant is permitted to testify as to his understanding of the law and the trial judge properly instructs the jury on the issue of good faith. *Cooley v. United States*, 501 F.2d 1249, 1253-54 (9th Cir. 1974).

Schaut's letters written to the IRS and Treasury Secretary Regan in late 1981 and 1982 were properly excluded. The letters were cumulative either to Schaut's testimony or to other letters that were admitted. "The exclusion of relevant, but cumulative, evidence is within the sound exercise of the trial court's discretion." *United States v. Marabelles*, 724 F.2d 1374, 1382 (9th Cir. 1984). *See* Fed. R. Evid. 403.

It was not an abuse of discretion to exclude the testimony of Schaut's witnesses Peter Collarafi, Adrienne Flipse and Robert Collins. The testimony involved inadmissible hearsay, was more prejudicial than probative, included legal conclusions beyond the province of the jury, or was irrelevant to Schaut's defense of good faith. Fed. R. Evid. 802, 403, 402; *Cooley*, 501 F.2d at 1253-54.

III.

The district court judge inspected *in camera* redacted portions of an IRS report that had not been released to Schaut, and sustained the redactions saying they contained "nothing that is exculpatory of Mr. Schaut." It appears from the court's statement that the judge may have examined the redactions only for exculpatory material producible under *Brady v. Maryland*, 373 U.S. 83 (1963) and not also for impeachment material producible under the Jencks Act, 18 U.S.C. § 3500 (1982).

Any error committed by the court, however, was harmless. We have examined the redacted portions of the report and find that they contain no material producible under the Jencks Act.

IV.

It was not error to instruct the jury that it could consider "the reasonableness of the defendant's beliefs in determining whether or not they were held in good faith." The instruction did not shift the burden of proof to Schaut to demonstrate that his misunderstanding of the law was objectively reasonable. It simply permitted the jury to consider the reasonableness of Schaut's beliefs

as one factor among many in assessing whether he acted in good faith.

It was not error to refuse to give a separate jury instruction on Schaut's theory of defense. Schaut's only theory of defense was that he acted under a good faith belief that wages were not income and that he therefore was not required to file income tax returns. The issue of good faith was fairly and adequately covered in the willfulness instruction given by the court. While the defendant is entitled to a jury instruction on his theory of the case, *United States v. Marabelles*, 724 F.2d at 1383, he cannot insist on particular language if the jury is clearly and adequately instructed on the applicable law. *United States v. Smith*, 735 F.2d 1196, 1198 (9th Cir. 1984).

We have examined Schaut's remaining contentions and find them without merit.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1273

D.C. No. CR 84-64
PHX-EHC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES DARE SCHAUT,

Defendant-Appellant.

ORDER

(Filed January 29, 1986)

Before: BROWNING, Chief Judge, ANDERSON and NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.